CHOO AH KOW

v.

YEOW YEW THIAM & ANOR.

SUPREME COURT, KUALA LUMPUR
WAN SULEIMAN SCJ
MOHD. AZMI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 588 OF 1987]
13 DECEMBER 1988

CONTRACT: *Sale and purchase agreement - Attorney of vendor repudiated agreement - Default judgment entered against attorney - Vendor disputed authority of attorney - Joint liability not established - Doctrine of election did not apply.*

This was an appeal by the appellant/plaintiff against the decision of the High Court whereby the appellant's claim against the first respondent/ first defendant was struck out. The appellant had obtained a default judgment against the second respondent/second defendant. The appellant had entered into a sales and purchase agreement with the second respondent who acted as the attorney of the first respondent pursuant to a power of attorney. The appellant who was the purchaser made a part-payment. The second respondent refused to accept the balance of the payment. The first respondent was the owner of the land in dispute. The first respondent contended *inter alia* that the second respondent had no authority to carry out the transaction. The issues were whether the doctrine of election applied and whether the liability of the respondents were joint and several.

Held:
The doctrine of election did not apply as the joint liability of the respondents had not been established. The first respondent had to prove at the trial that the second respondent had no authority to act on his behalf. If he succeeded at the trial, the respondents would not be jointly liable.

[Appeal allowed with costs.]

Case referred to:
Hagemeyer Trading Co. (Malaysia) Sdn. Bhd. v. Gibson Trading Co. [1978] 2 MLJ 101

Legislation referred to:
Contracts Act 1950, s. 179
Rules of High Court 1980, O. 13 r. 4(1)

For the appellant - Cyrus V. Das (P.H. Yeo with him); M/s. Shook Lin & Bok
For the respondent - Anad Krishnan; M/s. James Foong & Anad

JUDGMENT

Mohd. Azmi SCJ:

Under s. 42 Courts of Judicature Act 1964.

This is an appeal by the plaintiff from the decision of the High Court Judge in Kuala Lumpur in allowing an application by the first defendant for the plaintiff's claim against him be struck out on the ground of the doctrine of election, i.e. due to the plaintiff's cause of action against him being merged in the default judgment obtained by the plaintiff against the second defendant.

The facts of the case had been summarised by the Learned Judge in the following passage of the written judgment:

> In this suit the plaintiff's cause of action is founded on a sale and purchase agreement dated 5 February 1983 executed by him with the second defendant, acting as the attorney of the first defendant pursuant to a Power of Attorney dated 17 January 1983. Under the agreement, the plaintiff agreed to purchase the first defendant's 7/8 undivided share of a piece of land together with the ground floor of a building and 5 flats erected thereon (the property). The purchase price was agreed at RM600,000 and at the time of the filing of this suit, the plaintiff had already paid RM379,500 to the 2nd defendant leaving a balance of RM220,500 which the 2nd defendant refused to accept when tendered thereby treating the agreement as repudiated. It is this repudiation which the plaintiff now avers as having been made without just cause and he claims specific performance of the agreement against both the defendants, damages for its breach, removal of the caveat lodged by the first defendant and an injunction restraining them from dealing with the property in any manner whatsoever. Alternatively he also claims the return of the RM397,500 paid to account together with interest.
>
> On 28 February 1986, judgment in default of appearance was entered against the second defendant and consequent upon this judgment and relying on the doctrine of election, the first defendant applied to have the statement of claim against him set aside with costs.

The judgment in default of appearance dated 25 February 1986 was made pursuant to O. 13 r. 4(1) of the Rules of the High Court 1980 and it was in the following terms:

> No appearance having been entered by the second defendant herein it is this day adjudged that the second defendant do give the plaintiff possession of the immovable property described in the Writ of Summons and statement of claim as 7/8 undivided share of land held under CT 22669 Lot 1185, Section 46, Town of Kuala Lumpur together with the Ground Floor of premises No. 25 and Flats No. 25A, 25C, 25D, 25E, and 25F erected thereon measuring in area 1,748 square feet more or less and it is further adjudged that the 2nd defendant to pay the plaintiff damages to be assessed and costs to be taxed.

The main ground of appeal is that the Learned Judge was wrong in law in applying the doctrine of election in this particular case. Paragraph 5 of the Amended Memorandum of Appeal stated that,

> The Learned Judge had proceeded on the wrong premise in law that because the plaintiff/appellant had pleaded for an alternative remedy and not an alternative cause of action against the two defendants that the doctrine of election applied and that the plaintiff/appellant's action got merged in the default judgment obtained against the second defendant. The Learned Judge had wrongly construed the law in this regard and failed to note that both in regard to cause of action and remedy, the defendants were sued jointly and severally for specific performance and in the alternative for the refund of the purchase money.

In our view the material issue to be determined in this case is whether the liability of the first and second defendants was several or joint, and not whether the remedies pleaded by the plaintiff were in the alternative. Several liability arises when two or more persons make separate promises to another giving rise to more than one obligations, whether by the same instrument or by different instrument. Their promises are cumulative and discharge of liability by one does not discharge the other. Whereas joint liability arises when two or more persons jointly promise to do the same thing. There is only one obligation. Consequently performance by one discharges the others. It is for this reason that the principle of election only applies where several defendants are sued in the alternative in a situation in which they jointly promised to do the same thing. This must be the main basis of the judgment of the Federal Court delivered by Chang Min Tat, FJ in *Hagemeyer Trading Co. (Malaysia) Sdn. Bhd. v. Gibson Trading Co.* in [1978] 2 MLJ 101.

In this case, although the second defendant (the attorney) and not the first defendant (the principal) had executed the sale and purchase agreement as a vendor, the obligation to transfer the property or alternatively to pay damages and to return the purchase price was in law imposed on the first defendant. By virtue of the power of attorney, the first defendant should be bound by the act of his attorney as if the sale agreement was executed by him personally. Normally liability would therefore be joint and not several - there being only one obligation. Performance by one would discharge the other and consequently, depending on the facts of each case the principle of election would apply. As provided by s. 179 Contracts Act 1950,

> Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

However, in the present case, the facts of the case as presented in the pleadings, had rendered the applicability of the doctrine of election more complex than it should have been, In para. 2 of the statement of claim, the plaintiff alleged that,

> The said agreement was executed by the second defendant as the lawful Attorney of the first defendant pursuant to the Power of Attorney dated 17 January 1983, given by the first defendant to the second defendant for valuable consideration empowering the second defendant amongst other things to dispose off the said property and to do and perform all acts and things in the discharge of such disposal as fully and completely as the first defendant might himself in a position to do.

In answer to this allegation, para. 2 of the amended statement of defence, averred that,

> The first defendant has no knowledge of para. 2 of the statement of claim and puts the plaintiff to strict proof of the contents thereof.

In fact, the first defendant both in his original defence dated 1 June 1984 and amended defence denied that the second defendant was his lawful attorney or that he had authorised the second defendant to sell the property. It was his contention that the second defendant was in fact a purchaser and the plaintiff a sub-purchaser of the property. He also counterclaimed against the plaintiff for a declaration that the sale and purchase agreement was not binding on and enforceable against him, and also for a declaration that the plaintiff had been in breach of the terms and conditions of the sale agreement, and that the said agreement had been repudiated. In view of these averments by the first defendant in his pleading, the question whether this is a case of a joint liability or not can be determined only after the trial of the issues raised by the first defendant in his averments. If he succeeds at the trial to establish his allegations, there would be no question of joint liability.

The general rule is that where the plaintiff is in reasonable doubt as to the actual person from whom he is entitled to redress, he may join two or more defendants in one action, and make his claim against them severally and/or jointly. Thus, where each of the two proposed defendants blames each other, the proper course is to join both, and to make the claim against them severally and/or jointly, but where the liability is joint and the claim is in the alternative, a judgment against one of them is equivalent to an election to sue that one and a bar to further proceedings against the other. In this particular case, the first defendant (the principal) is blaming the second defendant (the attorney) not only for acting without authority in selling the property to the plaintiff but also apparently in not paying him the balance of the purchase price within the stipulated time. Since the second defendant appeared to refuse these allegations, it is perfectly in order for the plaintiff to join them and to make the claim against them jointly and severally. Because of the apparent dispute between them, both the sale

agreement and the Power of Attorney would necessarily create cumulative promises to the plaintiff which each of them would be legally bound to perform under the two instruments depending on whether the transaction was a sub-sale or otherwise. The fact that the remedies prayed for by the plaintiff are in the alternative is not really material. In the circumstances of this case, the doctrine of election does not apply.

The other main arguments relates to the provisions of O. 13 r. 4(1) Rules of High Court which provides:

> where a writ is indorsed with a claim against a defendant for possession of immovable property only, then, if that defendant fails to enter an appearance, the plaintiff may ... enter judgment for possession of the immovable property as against that defendant and costs, and proceed with the action against the other defendants if any.

In para. 6 of the Amended Memorandum of Appeal it is stated that,

> That Learned Judge had misconstrued O. 13 r. 4 in failing to note that because the plaintiff/ appellant's action was in relation to immovable property he was not entitled to enforce any default judgment obtained where there were other defendants defending.

The Learned Judge dealt with this particular aspect of the case as follows:

> The fact that default judgment was entered under O. 13 r. 4(1) is quite immaterial as that Order and rule is qualified to the extent that where a default judgment has been entered against one defendant for possession of immovable property, the plaintiff can still proceed with the action against the other defendants, if any. The words "if any" limit the right of continuing the action against the other defendants and since the plaintiff in the instant case had exercised his option to enter judgment against the second defendant, he is barred from continuing with the same cause of action against the first defendant as the principal of the second defendant.

We are unable to agree with the Learned Judge on this point. In our view, the words "if any" in O. 13 r. 4(1) refer to "defendants" and not "action'. In the circumstance, there is no bar to further proceedings by the plaintiff against the first defendant despite the judgment in default of appearance entered against the second defendant. In any event, the plaintiff's claim against the first defendant includes a prayer for an order to execute a memorandum of transfer of the property, whereas the default judgment against second defendant does not include such order but orders for the possession of the property and for damages only.

For the above reasons, we hold the view that the principle of election does not apply in this particular case.

The appeal is accordingly allowed with costs both here and in the Court below. The security deposit is refunded to the appellant.

Also found at [1989] 1 CLJ 128